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work involving the every-day care of the train or roadbed,¹⁸ or the care of subjects of transportation,¹⁹ is employment in interstate commerce. Thus, an employee in a roundhouse lifting ice to place it aboard a train for the use of interstate passengers is within the act.²⁰ But a line is drawn by a recent case excluding the crew of an intrastate train hauling water to a tank from which other employees were to supply interstate trains. *Missouri, Kansas, & Texas Ry. v. Fesmire*, 150 S. W. 201 (Tex., Ct. Civ. App.). The crew were only concerned with the intrastate carriage of the water and had no direct connection with the interstate train.

The repair of interstate instrumentalities raises somewhat more doubtful questions. Workmen making slight repairs to interstate cars are within the act, because they plainly assist the car on its journey.²¹ But if the repair necessitates the car's withdrawal from use for a considerable time the journey has ceased, and repair is no more interstate commerce than is manufacture of new cars.²² Work on the roadbed is difficult to classify. Men building a new roadbed, as men manufacturing new cars, though facilitating interstate commerce do not so directly assist in the transportation of the subjects thereof as to come within the act. Consequently in a recent case it was held that work on a bridge on which a track to carry interstate trains was to be laid was not interstate commerce. *Pedersen v. Delaware, Lackawanna & Western R. Co.*, 197 Fed. 537 (C. C. A., Third Circ.). It seems impossible, however, to distinguish in this regard slight repairs to a track over which interstate trains pass from slight repairs to an interstate car,²³ but a man apparently making such repairs was refused recovery in a recent case. *Pierson v. New York, Susquehanna & Western R. Co.*, 85 Atl. 233 (N. J., Ct. Err. and App.).

WHAT LAW GOVERNS MARITIME LIENS. — It is usually for the advantage of all parties having an interest in a ship, whether such interest be in the nature of ownership or security, that she should be actively engaged in commerce and not left to rot in port. But to continue in active employment she must have supplies and services. To obtain them she

Philadelphia & Reading Ry., 4 Penn. (Del.) 80, 53 Atl. 90. *Contra*, *Van Brimmer v. Texas & Pacific Ry. Co.*, 190 Fed. 394.

¹⁸ Such as car-wipers, car-inspectors, porters, track-walkers, etc.

¹⁹ Such as ticket-sellers, baggagemen, gatemen, station porters, etc. But see *Zachary v. North Carolina R. Co.*, 156 N. C. 496, 500, 72 S. E. 858, 859. A clerk taking the numbers of interstate cars after they have reached the end of their journey has been held without the act. *St. Louis, etc. Ry. v. Seale*, 148 S. W. 1099 (Tex., Ct. Civ. App.).

²⁰ *Freeman v. Powell*, 144 S. W. 1033 (Tex., Ct. Civ. App.).

²¹ *Johnson v. Great Northern Ry.*, 178 Fed. 643; *Darr v. Baltimore & Ohio R. Co.*, 197 Fed. 665. *Cf. Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 Sup. Ct. 617. Though an extreme example, it would seem that a physician removing a cinder from the eye of an engineer about to start on an interstate run would be engaged in interstate commerce although perhaps not an "employee" within the act.

²² *Heimbach v. Lehigh Valley R. Co.*, 197 Fed. 579. *Contra*, *Northern Pacific Ry. v. Maerkl*, 198 Fed. 1. This decision seems indefensible.

²³ *Zikos v. Oregon R. & Navigation Co.*, 179 Fed. 893; *Colasurdo v. Central R. of N. J.*, *supra*. *Contra*, *Taylor v. Southern Ry. Co.*, 178 Fed. 380. A wrecking crew would seem to be in the same category.

must have credit. Admiralty law in most countries secures this for her by implying a maritime lien in favor of those who furnish such necessities and providing that the last maritime lien to attach shall take precedence over all non-maritime liens and all previous maritime liens.¹ Under the influence of the common law, however, this broad principle was restricted in England.² Though a maritime lien was allowed for seamen's wages, pilotage, towage, etc., the "materialman," *i. e.*, the man furnishing necessary supplies and the like, to a ship in port, acquired no maritime lien unless a formal bottomry bond was executed.³ English admiralty jurisdiction was enlarged by Victorian statutes.⁴ But these statutes merely give the materialman a right to sue in admiralty and arrest the ship if she has been supplied in a foreign port and the owner is not domiciled in England.⁵ The lien attaches only from the date of arrest, and in the distribution of the proceeds it is postponed to all previously existing secured claims. The Scotch admiralty law seems to take the same view.⁶ Admiralty law as adopted in the United States allows the materialman a maritime lien if the necessities have been furnished in a foreign port on the credit of the ship, but not otherwise.⁷ State statutes, however, giving materialmen supplying domestic vessels in their home port maritime liens have been enforced in the federal courts, on the ground that they give a cause of action within the exclusive admiralty jurisdiction of the federal judiciary.⁸ But when they attempt to create maritime liens unknown to the "general admiralty law" they are held unconstitutional as interfering with the exclusive control of Congress in matters of interstate and foreign commerce requiring uniformity.⁹

Such unfortunate variations in the maritime law as applied in different

¹ See *The J. E. Rumbell*, 148 U. S. 1, 9; *The St. Iago de Cuba*, 9 Wheat. (U. S.) 409, 416; *The Young Mechanic*, 2 Curt. (U. S.) 404, 406-413; *The De Smet*, 10 Fed. 483, 489, note. The last maritime lien takes precedence over previous liens, for their holders have benefited by the services rendered; also over all subsequent non-maritime liens, since they attach subject to existing interests.

² See *The Two Ellens*, L. R. 4 P. C. 161, 166; *The Scotia*, 35 Fed. 907, 908.

³ *The Neptune*, 3 Knapp 94.

⁴ See *THE ADMIRALTY COURT ACT*, 1840 (3 & 4 VICT. c. 65); *THE ADMIRALTY COURT ACT*, 1861 (24 VICT. c. 10).

⁵ *The Pacific*, Brown & L. 243; *The Henrich Bjorn*, 11 A. C. 270; *The Rio Tinto*, 9 A. C. 356. Consequently the claim of a mortgagee takes precedence over that of a materialman in the distribution of proceeds. *The Two Ellens*, *supra*; *The Scio*, L. R., 1 A. & E. 353; *The Lyons*, 6 Aspin. 199. These statutes cover not only British ships, but regulate the relief furnished to foreign ships in foreign ports as well. *The Mecca*, [1895] P. 98.

⁶ *Clark v. Hine*, 45 Scot. L. Rep. 879. See *Carrie v. McKnight*, [1897] A. C. 97, 101, 103, 108.

⁷ *The General Smith*, 4 Wheat. (U. S.) 438; *The Lottawanna*, 21 Wall. (U. S.) 558; *The Kalorama*, 10 Wall. (U. S.) 208. A lien is also given for supplies furnished to a domestic vessel masquerading as a foreign vessel. *The St. Iago de Cuba*, 9 Wheat. (U. S.) 409. The ground for this restriction on the broad doctrine of the civil law is that the credit of the ship is only needed when the credit of the owner cannot be properly investigated and obtained.

⁸ *The Young Mechanic*, *supra*; *The J. E. Rumbell*, *supra*. A lien called maritime by the state statute creating it, but not maritime in its nature, is not within the admiralty jurisdiction of the federal courts. *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393. Nor can the state courts give relief. *Cf. The Roanoke*, 189 U. S. 185.

⁹ *The Roanoke*, *supra*. *Cf. People's Ferry Co. v. Beers*, *supra*. For a full discussion of this subject see 21 HARV. L. REV. 332.

ports make it important to determine by what law maritime liens are created and enforced. It seems clear that the creation of a lien must be governed by the law of the place where the vessel is situated when the services are rendered.¹⁰ Thus if an English vessel is supplied with necessities in an American or French port and libeled in the United States the materialman's lien is upheld.¹¹ Conversely it is submitted that for supplies furnished to an English vessel in an English port, no lien should be recognized even though the vessel were libeled in the United States.¹² The creation of liens for services on the high seas, as for seamen's wages, is on the same theory governed by the law of the ship's flag.¹³ But though international comity requires that the creation of a lien by a foreign law be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libeled and sold.¹⁴ Thus in a recent case where a Russian ship mortgaged in England was libeled and sold in Scotland, the law of the forum was applied and the English mortgagee preferred to an intervening Danish materialman.¹⁵ *Constant v. Klompus*, 50 Scot. L. Rep. 27.

STATE TAXATION OF INTERSTATE COMMERCE. — To what extent a state may tax property engaged in interstate commerce is still a troublesome question.¹ It is clear that a tax distinctly laid on commerce itself,

¹⁰ The *Scotia*, *supra*; The *Maud Carter*, 29 Fed. 156. Cf. The *Maggie Hammond*, 9 Wall. (U. S.) 435. See WHARTON, CONFLICT OF LAWS, 3 ed., §§ 322, 358.

¹¹ The *Scotia*, *supra*. In England, however, whether or not the right is recognized, no jurisdiction is given to any court to enforce it.

¹² Cf. The *Infanta*, 13 Fed. Cas. No. 7030. Note that a French decision *contra* was regarded as erroneous but not void, as it was based on a mistake in English law. *Castrique v. Imbrie*, 4 H. L. Cas. 414.

¹³ The *Olga*, 32 Fed. 329; The *Velox v. Werke*, 21 Fed. 479; The *Angela Maria*, 35 Fed. 430; The *Belvidere*, 90 Fed. 106. But cf. The *Tagus*, [1903] P. 44, where the law of the forum was applied and the master of a foreign ship given a maritime lien for wages for a series of voyages, although the law of the flag gave him one only for the last voyage. The explanation is probably that if a lien has ever existed, its "staleness" by analogy to statutes of limitations is to be determined by the law of the forum.

¹⁴ *Clark v. Hine*, 45 Scot. L. Rep. 879; The *Union*, Lush. 128; The *Selah*, 40 Sawy. 40, 21 Fed. Cas. No. 12,636. Cf. *Harrison v. Sherry*, 5 Cranch (U. S.) 289. See The *Scotia*, 35 Fed. 907, 910; STORY, CONFLICT OF LAWS, §§ 323, 423 *b*.

¹⁵ It might be contended that the essential nature of a maritime lien is that it gives a vested right superior to all prior non-maritime interests, and that to postpone it to a mortgage is to refuse to recognize its existence. But the foreign sovereign, though he may pass a valid title to a ship even in erroneous proceedings, as in *Castrique v. Imbrie*, *supra*, has not jurisdiction to give a qualified interest, which will forbid the sale of a ship in another forum later acquiring jurisdiction, or specify how the proceeds arising in that forum shall be distributed. Elsewhere the lien need only be regarded as giving such rights as the creating sovereign had jurisdiction to grant, namely, a claim against the vessel for which the sovereign of the forum may furnish such a remedy as he sees fit. It is submitted, however, that the only relief given a materialman in the English Admiralty Act is grossly inadequate.

¹ A state cannot levy a privilege tax on interstate commerce. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635. Nor on interstate corporations as a condition of doing business. *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232. But if as a condition of doing local business, it is constitutional. *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214. A cab service operated by a railroad to carry inter-